IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH:NAGPUR

CRIMIAL APPLICATION NO.3246 OF 2006

Sau. Jayashree Jivan @ Narhari Chide & others

versus

Jivan @ Narhari Daulatrao Chide

Mr. R.R.Vyas, K.R. Lule, P.T. Nebhanani,Advocates for applicants.
Mr.N.P.Dhurve,Advocate for respondent

CORAM: S.R. DONGAONKAR, J.

DATE: 28.11.2006

ORDER

Heard counsel for the parties.

Admit.

Heard finally with consent of the parties.

This is an application under section 482 of Criminal Procedure Code. The applicant challenges the order passed by the 2nd J.M.F.C. Wardha in Misc. Cri. Case No.61/2006 dated 9.8.2006 by which he granted permission without any specific written order to that effect to the respondent to lead evidence on the point of his incapacity to pay the arrears of maintenance amount.

2] It may be stated that the applicants have filed an application for recovery of maintenance and issue of distress warrant under section 125(3) of Cr.P.C. in Misc. Criminal Application no.61/2006. When the matter was in progress, learned trial court after hearing the parties, passed order in Roznama dated 9.8.2006 which reads:

> "Before the Court, Applicant by counsel, Non-Applicant by counsel, heard both sides, now case is fixed for Evidence on 28.8.2006"

Although this order does not specifically show as to whose evidence it was to be, it appears that the learned Executing Judge has passed an order to allow the respondent to lead evidence about his sufficient cause for not complying with the order of the learned Magistrate under section 125 of Cr.P.C.

3] Learned counsel for the applicant has contended that the evidence which the trial court has allowed to be led, was the point which was already concluded in earlier proceedings. He has also submitted that the respondent has not paid a single pai towards maintenance and he has agitated and re-agitating the same point again and again that he has sufficient cause for not paying maintenance. He has also submitted that the amount of Rs.1,19,900/- is still in arrears towards the said maintenance and the case is pending since about 6 years. He has referred the observations of the revisional court in the earlier recovery proceedings that the respondent has failed to establish that he has sufficient cause for not complying with the order of the court.

4] According to him respondent has also transferred his funds to his brother to avoid payment of maintenance. He has relied on certain decisions to contend that the points which the respondent has sought to be raised in those recovery proceedings has already concluded and now

it can not be re-agitated. Further he has also cited some rulings to show that the respondent can not lead any evidence to show that he is unable to pay maintenance. Further according to him when the respondent is taking treatment in well known hospitals, it can not be held that he is unable to pay maintenance. According to him, the order of the learned trial court to allow the respondent to lead evidence when the matter was already concluded, can not sustain and therefore, it is liable to be set aside, being abuse of process of law.

5] As against this, learned counsel for the respondent submits that there are expressed provisions under section 125(3) of the Cr.P.C. The person who has been ordered to pay maintenance can show sufficient cause for not complying with the order of the court and therefore, according to him, the order of the learned trial court is correct.

6] In order to appreciate the rival contentions of the parties, it would be seen that the matter of recovery proceedings, in the instant case was initiated by the application under section 125(3)of Cr.P.C. Later on the notices were issued to the respondent. The parties appeared in that case. Thereafter, the reply was filed by the non applicant's counsel. The matter was fixed for hearing on Exhibit 6 and thereafter this order came to be passed. It is worthwhile to note that the provisions of section 125(3)of Cr.P.C. read as under:

“125(3)-If any person so ordered fails without sufficient cause

to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the manner provided for levying fines, and may sentence such person, for the whole or any part of each month's [allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be remaining unpaid after the execution of the arrant, to imprisonment for a term which may extend to one month or until payment if sooner made:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due:

Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing."

7] Learned counsel for the applicant has mainly relied on the decision of this court reported in 1996(2) Mh.L.J. 471 Asha Anil Deshmukh ..vs.. Anil Mahadeorao Deshmukh & another], wherein in paragraph 8 it has been observed thus:

"8- However, at the outset, it must be state that the order of the trial Court is a completely confused order. The trial Court has not indicated as to what it is going to do after allowing the parties to lead the evidence. The Trial Court has not even bothered to decide as to whether it had power to set aside the original order. In that the trial Court has completely ignored the scope of the provision of section 125(3) as also section 127 of the Criminal Procedure Code. The trial Court should have remembered that these were the proceedings under section 124(3) for the recovery of the arrears. The rights of the parties

> had already been crystallised after a full trial and after the evidence was led before the trial Court. Section 125(3) provides only a modality to recover the arrears and the proceedings before the Court were not the original proceedings but the miscellaneous proceedings wherein the maintenance amount was sought to be recorded. Once the original order was confirmed by the revisional Court, there was no question of reopening that order much less on the grounds canvassed by the husband. This was certainly not an application at the instance of the husband wherein the husband had sought the alteration of the amount of the maintenance as contemplated in section 127 but by this application what was being attempted was to get the original application under section 125 dismissed. This certainly was not possible once that application was gone into the Magistrate and once the Magistrate had allowed the application after listening to the evidence led before him. Not only this but the order of the Magistrate was also confirmed by the Additional Sessions Judge before whom a revision was preferred by the husband. On this count alone, the evidence could not have been allowed to be led by the husband to wipe out the order granting maintenance. In this behalf, the record shows that a civil suit was also filed by the husband to get the order of maintenance cancelled and the same was withdrawn."

However, from the facts of that case as recorded in paragraph above would show that this case is clearly distinguishable on facts.

8] In that case, the application was raised by the husband to show that he was not able to pay maintenance, it was not a case of accepting the order of maintenance, but claiming, that for the sufficient reason he could not comply with the order of the court.

9] Another case which has been relied by the learned counsel for

the applicant is 1971 Cri.L.J. 774 [Gupteshwar Pandey ..vs.. Smt. Ram Peari Devi]. wherein what is meaning of sufficient cause was considered. Paragraph 6 of the same reads as under:

> "6-The third ground upon which the proceeding taken by the opposite party for the enforcement of the order of maintenance under sub-section (3) of Section 488 has been assailed before us is that it was or has been continued without disposing of the objection petition which the petitioner had filed before the Sub Divisional Magistrate on the 2nd January, 1964. Sub-section (3) of Section 488 gives jurisdiction to the Magistrate to take requisite steps for the enforcement of the order of maintenance if the person so ordered "fails without sufficient cause to comply with the order". It is no doubt true that the objection petition of the 2nd January, 1964 was not disposed of by the learned Sub divisional Magistrate before passing the order of the 17th February, 1964 or of the 29thJuly, 1968, but our attention has been drawn to the contents of the said objection petition which indicate that the enforcement of the order of maintenance which had already been passed on the 5th December, 1960, was sought to be challenged by the petitioner on the ground that he had no property or income of his own to be in a position to comply with the court's order of maintenance. In other words, the objections were of the nature which could have been and were in fact taken by the petitioner at the stage when the initial order contemplated by sub-section (1) of Section 488 was passed. The sufficiency of means was undoubtedly a question which the petitioner would and did raise in answer to the original petition of the 27th April 1969 and the same disposed of against the petitioner by the order of the 5thDecember, 1960 which in its turn was upheld by the Sessions Judge on the 17th January 1961. The precise questions would not be re agitated at the stage when the opposite party sought to ask for enforcement of the order in accordance with sub-section (3) of Section 488. Sufficient cause as envisaged by sub-section (3) of section 488 cannot legitimately be the same cause which the petitioner was called

> upon to show prior to the passing of the order of the 5th December,1960. An examination of the scheme of Section 488 will show that sub sections (1) and (2) of this section are in the nature of proceedings prior to a decree of the civil court, whereas sub section (3) may be compared to proceedings in execution of such a decree. While executing a decree a civil court cannot go behind the decree and reopen the questions decided between the parties at the stage of rendering the decree. Likewise in a proceedings under Sub s.(3) the Magistrate cannot be called upon to reconsider or go once again into those very questions which could be raised or which were decided at the earlier stage when the claim for maintenance was upheld and a direction for payment of the monthly allowance had been made."

It clearly seems that the sufficient cause referred in sub section (3) of Section 125, does not mean the cause or the defence which can be raised under section 125 of Cr.P.C.

10] Learned counsel for the applicant has also relied on the decision of this court in 1997(2) Mh.L.J. 250 [Sudha @ Ranjana R. Patil ..vs.. Rajkumar Deoganda Patil and another] wherein physical disability or lack of course of income was considered as no defence in the application under section 125 of Cr.P.C. Again it needs to be mentioned that it was a defence raised in the application under section 125 Cr.P.C. It was not a case of proceedings of issuing distress warrant, husband was raising plea that because of sufficient reasons, he can not comply with the order of the court.

11] Another decision which is relied by the learned counsel for the applicant is AIR 1957 ALLAHABAD 658 [Ram Kishore ..vs.. Sm. Bimla Devi and another] in which in paragraph 10 & 11 it is observed thus::

> "10- It would be seen from the extract quoted above that in the opinion of the learned Judge the phrase 'fails without sufficient case' includes the raising of the pleas which are mentioned in the sub-section (4). In my opinion the phrase which should have been interpreted was not merely 'fails without sufficient cause', but 'fails without sufficient cause to comply. 'Comply' means to yield to submit or to carry out. The word 'fails' also cannot connote the meaning of voluntary refusal . 'Failure to comply' can , in my opinion, include only such grounds which show that for some reason the person against whom the order was passed was not able to carry it out. These words do not give a discretion or right to the person against whom the order is passed to decide whether the original order was justifiable or not. An order passed by a competent court cannot be contested or challenged.
>
> 11- It is the basis principle of administration of justice that an order passed by a competent court is final and the same issue which has been decided in that case cannot be a reason for reconsidering the case. It is in the light of this basic principle that we should interpret the words 'fails without sufficient cause to comply'. If it is accepted that sub-section (4) governs sub-section (3), it would defeat the very purpose of S.488 Cr.P.C. An unscrupulous husband can again and again raise the plea of his wife living in adultery and the court would be compelled to enquire into this plea again and again. I asked the counsel for the applicant whether the very purpose of S.488 Cr.P.C. would not be defeated if the interpretation mentioned in the decisions cited above is accepted and he had to admit that it will have such an effect. Obviously such an interpretation cannot be accepted. Section 488 Cr.P.C. has been enacted to secure a speedy remedy for those neglected wives and children who are unable to maintain themselves. If a husband makes repeated allegations of adultery against his wife and the court must necessarily make an inquiry about these allegations whenever they are made it would be easy for him to considerably delay the execution proceedings if not completely put them to a standstill. Section 488 Cr.P.C. would then fail to achieve its purpose. In the words of Sr. James Fitz James Stephen "Section 488 is a mode of preventing vagrancy or at least of

> preventing its consequence" but if the husband can delay the execution of an order against him by taking mala fide and frivolous pleas, it will leave the wife unsupported for a fairly long time and thus it will not be instrumental in preventing vagrancy or its consequences."

It is clear that respondent husband can certainly show in the recovery proceedings of issuance of distress warrant that for sufficient cause he can not comply with the order of the court.

12] In the present case, learned counsel for the applicant has vehementally contended that in earlier proceedings of recovery, the respondent - husband has raised a similar plea which was not allowed by the learned J.M.F.C. and also by the revisional court.

13] It can not be forgotten that each such application under section 125(3) Cr.P.C. is for recovery of maintenance for different periods. Therefore, even if in the earlier case it was held that there was no sufficient cause for the husband to comply with the order of the court, that can not operate as res-judicata for the further proceedings, as that will be for latter period. In the latter application under section 125(3) of Cr.P.C. husband can certainly be allowed to say that he has sufficient cause for not complying with the order, though on facts, he can be disbelieved for the same.

14] The question is whether he should be allowed to adduce evidence in that behalf of not, in my opinion, considering the nature of

the provisions of section 125(3)Cr.P.C. husband would be entitled to lead evidence to show that he has sufficient cause for not complying the orders of the court for that particular period. In my opinion, the leading of the evidence by the husband would also be beneficial for the applicants so that they would be able to cross-examine him on this point and also lead evidence, to show that he is trying to avoid to make payment without any sufficient cause. In a way this is an opportunity to the applicants to raise their contentions effectively by way of cross-examining the respondent.

15] In this view of the matter, I do not find any sufficient reason to interfere with the order of the lower court under section 482 of Cr.P.C. for considering it abuse of process of law.

16] Thus the application is rejected, however, with a direction that the respondent shall lead evidence, if any, on the date fixed by the trial court, for this purpose, positively and the learned Trial Court in any case shall dispose of the said application within a period of one month from the date which he fixes for the recording of the evidence regarding “sufficient cause” in the said application. With these directions application stands disposed of.

JUDGE

smp.